

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:) Art Unit: 1625
BERG, Kurt Frimann)) Examiner: SOLOLA, T.
Serial No.: 10/532,341)) Washington, D.C.
Filed: April 22, 2005)) November 9, 2009
Patent No.: 7,585,890)) Docket No.: BERG=3
Issued: September 8, 2009)) Confirmation No.: 1525
For: PHARMACEUTICAL))
COMPOSITIONS COMPRISING))
FLAVONOIDS AND MENTHOL))

REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT

U.S. Patent and Trademark Office
Customer Service Window
Randolph Building
401 Dulany Street
Alexandria, VA 22314

S i r :

Pursuant to 37 CFR 1.705(d), reconsideration of the patent term adjustment (246 days) indicated on the face of the above-identified patent is hereby requested. The patent should have indicated a revised patent term to take into account the period of adjustment required by 1.704(b), which became known only once the patent issued.

In accordance with 37 CFR 1.705(b)(1), submitted herewith is the fee of \$200 as set forth in 37 CFR 1.18(e). If there is any underpayment or any other fee necessary for consideration of this request, please charge same to the deposit account no. 02-4035 of the undersigned.

The following statement of the facts involved is in compliance with 37 CFR 1.705(b)(2).

1. The correct patent term adjustment is 521 days.
2. The filing date for 1.705(a) purposes was April 22,

2005, so 14 months later was June 22, 2006. The period of delay under 37 CFR 1.703(a)(1) is 400 days, as properly calculated by the PTO (the period of time from June 22, 2006 to the end of the "A" period on July 27, 2007, when the first office action under 35 USC 132 was mailed).

3. There are no adjustments under 1.703(a)(2)-(6).

4. However, the PTO failed to take into account the non-overlapping period of delay under 37 CFR 1.703(b)(1). The period of time from the beginning of the "B" period on April 22, 2008 3 years after the national stage commencement of April 22, 2005) to the end of the "B" period on the filing of the first RCE on December 1, 2008, was 275 days.

5. There is no overlap within the meaning of 1.703(f), as interpreted by the U.S. District Court in *Wyeth v. Dudas*, 2008 U.S. Dist. LEXIS 76063 (D.D.C. September 30, 2008) between the "A" period ending July 27, 2007 and the "B" period beginning April 22, 2008.

6. The patent is not subject to a terminal disclaimer.

7. The PTO correctly calculated the period attributable to applicant's delay as 154 days.

8. The correct patent term adjustment is the sum of the A period (400 days) and B period (275 days), minus the overlap (0 days) and minus any period attributed to applicant's delay (37 CFR 1.704). Thus, the patent term adjustment should be 400+275-0-154=521 days.

9. This request is timely under 1.705(d). These issues could not have been raised on or before the date of payment of the issue fee (08-03-09) as the PTO does not consider the effect of the "B" period until it mails the issue notification.

Accordingly, this request for reconsideration of the patent

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term adjustment must be permitted under 37 CFR 1.705(d).

Granting of this request and modifying the patent term adjustment afforded this case to a total of 521 days are therefore earnestly solicited.

Respectfully submitted,

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